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September 22, 2000  
OFFICE OF THE  
EXECUTIVE SECRETARY

**Guy M. Hicks**  
General Counsel

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VIA HAND DELIVERY

David Waddell, Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: *Petition of MCI WorldCom to Enforce Interconnection Agreement with  
BellSouth*  
Docket No. 99-00662

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Comments of BellSouth Telecommunications, Inc. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch  
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee

In Re: *Petition of MCI WorldCom to Enforce Interconnection Agreement with BellSouth*  
Docket No. 99-00662

**COMMENTS OF BELL SOUTH TELECOMMUNICATIONS, INC.**

In accordance with the Hearing Officer's September 1, 2000 Order Revising Procedural Schedule and Setting Hearing, BellSouth Telecommunications, Inc. ("BellSouth") submits its comments on whether an evidentiary hearing with live testimony is necessary. In this proceeding, an evidentiary hearing with live testimony, and live cross-examination, is necessary and appropriate. There is no agreement among the parties to waive a live hearing and cross-examination, and there are genuine issues of material fact which must be resolved by the Hearing Officer<sup>1</sup>.

**I. When testimony is presented – as it has been in this docket – the parties are entitled to cross-examine the witnesses presenting the testimony.**

The Authority appointed the General Counsel to act as Hearing Officer in this matter to render an initial decision on the merits, pursuant to T.C.A. §4-5-301 and

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<sup>1</sup> In certain arbitration proceedings, parties, including BellSouth, have mutually agreed to waive live testimony and cross-examination with respect to issues involving whether reciprocal compensation should be paid for ISP-bound traffic. In the arbitration proceedings, unlike this complaint proceeding, there was no need to interpret a contract or determine the intent of the parties with respect to that contract or to determine the amount of damages.

§65-2-111.<sup>2</sup> These statutes provide for contested case proceedings. T.C.A. §65-2-111 provides that in any contested case the Authority may direct that the proceedings be heard by a hearing examiner and that the hearing officer shall make a proposal for decision in writing which shall include the findings of fact and conclusions of law. T.C.A. §4-5-312(b) provides that to the extent necessary for full disclosure of all relevant facts and issues, the hearing officer shall afford all parties the opportunity to present evidence and conduct cross-examination. The Authority's new procedural rules also provide that when testimony is presented, parties shall have the right to cross-examine the witnesses who present the testimony. See 1220-1-2-.16.

In this docket, MCI's witnesses have presented testimony. BellSouth therefore, has the right to cross-examine MCI witnesses Aronson and Martinez in this proceeding.

**II. BellSouth does not waive its right to cross-examination because genuine disputes of material fact exist in this docket.**

The basic issue in this case is whether BellSouth and MCI WorldCom mutually agreed to pay reciprocal compensation for traffic to internet service providers ("ISPs") under their 1997 interconnection agreement. The parties disagree, as a factual matter, on whether there was any such agreement. (See, for example, Hendrix Rebuttal at 3-4, 10, 15 and Martinez Direct at 2, 3). According to Mr. Martinez, he was the "lead negotiator in the negotiation of the

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<sup>2</sup> See Order Appointing Hearing Officer dated December 21, 1999 at page 1.

interconnection agreement on behalf of MCI.” Mr. Martinez also testified that he was “... quite familiar with the provisions [of the agreement] discussed below and what the parties intended them to accomplish.” Martinez Direct at page 2. Mr. Hendrix, one of BellSouth’s witnesses, states that he was BellSouth’s negotiator and that the parties did not agree to pay reciprocal compensation for ISP-bound traffic under the terms of the agreement between the parties. Hendrix Rebuttal at Page 3-4, 16.<sup>3</sup> BellSouth submits that it is necessary and appropriate for the Hearing Officer to hear live testimony from the negotiators of the interconnection agreement and to allow cross-examination of those witnesses before rendering findings of fact and conclusions of law in this proceeding.

BellSouth recognizes that the Authority resolved the Brooks Fiber case without a hearing. (See Docket No. 98-00018). Although MCI will undoubtedly urge the same outcome here, BellSouth submits that it would be error for the Hearing Officer to do so. Unlike the Brooks Fiber case (in which BellSouth was not permitted to present testimony), BellSouth has presented testimony of Jerry Hendrix and David Scollard in this docket. This testimony makes clear that disputed factual issues exist, which cannot be resolved without a hearing. MCI’s anticipated request to forego any cross-examination or live testimony improperly seeks to ignore the situation of the parties and the accompanying circumstances at the time the parties entered into the 1997 interconnection agreement.

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<sup>3</sup> BellSouth also contends that the Authority lacks jurisdiction over ISP traffic because such traffic is interstate in nature.

Whether or not the agreement is ambiguous, the Hearing Officer should consider such facts in interpreting the agreement. *See Stoval v. Dattel*, 619 S.W.2d 125, 127 (Tenn. Ct. App. 1981) (“Again in construing a contract, court must consider the “situation” involving the parties, the nature of the business in which they are engaged and the subject matter to which the contract relates”). As the Tennessee Supreme Court has explained:

The Court in interpreting words or other facts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation, *even to an agreement that on its face is free from ambiguity, it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into* – not for the purpose of modifying or enlarging or curtailing its terms but to aid in determining the meaning to be given to the agreement. *Hamblen Co.*, 656 S.W.2d at 334 (quoting Restatement of Contracts, §235(d) and Comment.) (Emphasis added)

If the Hearing Officer finds that the agreement may be fairly understood in more ways than one, the agreement is ambiguous as a matter of law. *See Gredig v. Tennessee Farmers Mutual Insurance Co.*, 891 S.W.2d 909, 912 (Tenn. Ct. App. 1994). When a contract is ambiguous, extrinsic evidence is admissible to aid in discerning the parties’ intent, which precludes the granting of summary judgment. *Employees Credit Union v. Thornburg*, 680 S.W.2d 791, 792 (Tenn. Ct. App. 1984).

While no motion for summary judgment has been filed, MCI WorldCom has indicated to the Hearing Officer that it anticipates filing such a motion.<sup>4</sup> This case, however, is not appropriate for summary disposition. Summary judgments are appropriate only when there are no genuine material factual disputes regarding the claim embodied in the motion and when the moving party is entitled to a judgment as a matter of law. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

It is clear that there are genuine issues of material fact in this proceeding. MCI witness Aronson alleges, among other things, that MCI WorldCom is entitled to recover a sum certain from BellSouth. ("As of the last invoice sent to BST on April 10, 2000, the total amount that is due and owing from BST to MCImetro for reciprocal compensation in Tennessee is \$3,575,462." (See Aronson Direct at page 2.) Mr. Aronson is mistaken as Mr. Hendrix's testimony points out. Even assuming that MCI is entitled to reciprocal compensation for ISP-bound traffic under the terms of the amount of interconnection agreement (which is not the case), Mr. Aronson's calculation of damages is incorrect. (See Hendrix Rebuttal at pp. 2, 3, 18-20). This is clearly an issue of fact which should be addressed in a live hearing.

Likewise, while Mr. Aronson attempts to persuade the Authority to adopt a specific reciprocal compensation rate, (See Aronson Direct at p. 3), Mr. Hendrix

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<sup>4</sup> See Transcript of Pre-Hearing Conference of 3/15/00, at pp. 3, 8. BellSouth disagrees that this case is appropriate for summary judgment.

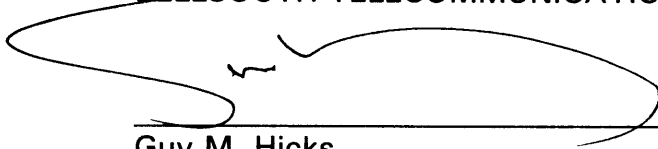
disagrees with Mr. Aronson's proposed rate. (See Hendrix Rebuttal at pp. 18-20). This is yet another issue of fact which should be decided in a live hearing after cross-examination. MCI's own witness acknowledges the existence of this dispute. ("I understand today that BellSouth is also disputing the \$.005 rate level for reciprocal compensation that has been billed by MCI . . . ."). (See Aronson Direct at p. 3). As Mr. Hendrix points out, MCI WorldCom is not entitled to this rate. Unlike BellSouth, MCI WorldCom does not provide a tandem switching function and does not provide common transport. Indeed, as Mr. Hendrix makes clear, MCI must meet two FCC requirements in order to be compensated at the same tandem interconnection rate as BellSouth: (1) MCI's network must perform functions similar to those performed by BellSouth's tandem switch; and (2) MCI's switch must serve a geographic area comparable to BellSouth's. BellSouth is entitled to cross-examine MCI's witness with respect to any claim or offer of proof that it meets these two FCC requirements. In other words, MCI WorldCom must submit facts, subject to cross-examination, to support any claim that its network performs functions similar to those performed by BellSouth's tandem switch or that MCI's switch serves a geographic area comparable to BellSouth's. (See Hendrix Rebuttal at pp. 18-20).

**III. Summary**

In summary, the Hearing Officer in this case is faced with resolving genuine disputed issues of material fact. He should not do so without the benefit of a live hearing and cross-examination.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Guy M. Hicks", is written over a horizontal line. The signature is stylized with a large loop on the left and a smaller loop on the right.

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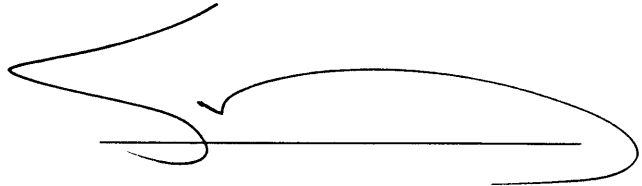


CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☐ Hand
- ☒ Mail
- ☐ Facsimile
- ☐ Overnight

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A handwritten signature in dark ink, appearing to be "H. Walker", written over a horizontal line.